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United States Bankruptcy Court  
San Jose, California

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re	]	Case No. 07-53166 ASW
SANGMUN KIM,	]	Chapter 7
Debtor.	]	
<hr/>		
DONGJIN SEMICHEM CO., LTD.,	]	Adv. Proc. No. 08-5023
Plaintiff,	]	
v.	]	
SANGMUN KIM,	]	
Defendant.	]	
<hr/>		

**MEMORANDUM DECISION**

Before the Court is the Application for Entry of Default Judgment Against Defendant Sangmun Kim (the "Application") filed by Plaintiff Dongjin Semichem Co., Ltd. ("Dongjin"). Dongjin is represented by Attorney Craig C. Chiang of the law firm Buchalter Nemer. Defendant Sangmun Kim ("Debtor") is representing himself in propria persona. Having considered the Application, the supporting declarations and the further pleadings in this and the underlying Chapter 7 bankruptcy case, the Court finds that judgment should be

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1 entered against Debtor under Bankruptcy Code §§ 523(a)(2) and  
2 727(a)(3).<sup>1</sup>

3 This Memorandum Decision constitutes the Court's findings of  
4 fact and conclusions of law, pursuant to Rule 7052 of the Federal  
5 Rules of Bankruptcy Procedure.

7 **I.**

8 **FACTS AND PROCEDURAL BACKGROUND**

9 On January 31, 2008, Dongjin filed a Complaint to Determine  
10 Nondischargeability of Debt Pursuant to 11 U.S.C. Section  
11 523(a)(2), and (a)(6) and to Object to Discharge Pursuant to  
12 Section 11 U.S.C. Section 727(a)(2), (a)(3), (a)(4) and (a)(5) (the  
13 "Complaint"). The Complaint relates to an arbitration award in the  
14 amount of \$944,696.46 issued in Dongjin's favor against Debtor on  
15 July 9, 2007 (the "Arbitration Award").<sup>2</sup>

16  
17 **A. Dongjin's Investment in Emailfund**

18 The underlying arbitration between the parties relates to  
19 Dongjin's investment in a California corporation named Emailfund,  
20 Inc. ("Emailfund"). Declaration of G. Forsythe Bogeaus in Support  
21 of Application for Entry of Default Judgment Against Defendant  
22 Sangmum Kim (the "Bogeaus Declaration") at ¶4. Dongjin is a large

23  
24 <sup>1</sup> Unless otherwise provided, all references to code sections  
25 shall mean the Bankruptcy Code, codified in Title 11 of the United  
26 States Code, 11 U.S.C. § 101, et seq., including all amendments  
27 thereto.

28  
<sup>2</sup> A copy of the Arbitration Award is attached as Exhibit A to  
each of the three declarations filed in support of the Application.

1 Korean corporate manufacturer of chemicals for the semiconductor  
2 industry. Declaration of Chun Hyuk Lee in Support of Application  
3 for Entry of Default Judgment Against Defendant Sangmun Kim ("Lee  
4 Declaration"), ¶ 5. Emailfund "'engaged in research and  
5 development of PDA security software technology'." Bogeaus  
6 Declaration at ¶ 4 quoting October 10, 2005 deposition of Debtor.  
7 By a stock purchase agreement dated June 24, 2000, Dongjin agreed  
8 to invest in Emailfund (the "Agreement") to develop secure internet  
9 software to be installed into a chip. Lee Declaration at ¶ 5.

10 Debtor "was the Chief Executive Officer of, and the President  
11 and a Director of, Emailfund from its inception until at least  
12 July, 2001." Arbitration Award at 1, Exhibit A to Lee and Bogeaus  
13 Declarations. Debtor and Emailfund were determined to be alter  
14 egos in the findings of the Arbitration Award. Id. at 5-6.

15 Under the Agreement, upon performance by Emailfund of certain  
16 conditions, Dongjin was to make staged investments up to the total  
17 sum of \$2 million in exchange for staged delivery of Emailfund  
18 shares. Lee Declaration at ¶ 5. An initial \$200,000 was due and  
19 paid by Dongjin upon the signing of the Agreement. Lee Declaration  
20 at ¶ 18. An additional \$600,000 was due upon Debtor's assembly of  
21 the team to bring the product into its beta phase. Id. Debtor did  
22 not get the esteemed scientists he had represented would be on the  
23 team, but assured Dongjin that the persons hired would be fine.  
24 Based on this representation, Dongjin authorized the additional  
25 \$600,000 transfer. Id. To obtain the next big chunk of the  
26 investment funds, Emailfund had to provide a successful  
27 demonstration of the beta phase of the product. Lee Declaration at  
28

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¶ 20. Such a demonstration was scheduled, but not successfully completed in Dongjin's opinion. Lee Declaration at ¶¶ 20-23. Dongjin asked for Emailfund's financial information from Debtor and was rebuffed repeatedly. Lee Declaration at ¶¶ 24-27.

After Dongjin made an initial \$800,000 investment, Dongjin asserts it then discovered that material representations made by Debtor and Emailfund to induce Dongjin to enter into the Agreement were false. Specifically, Dongjin alleges in the Complaint at ¶ 7 that Debtor made the following misrepresentations:

- (1) Debtor and Emailfund developed an encryption technology based on wireless technology as the first developer of such technology in the world (see also Lee Declaration at ¶¶ 6, 7 and 10; Bogeaus Declaration at ¶ 47);
- (2) Emailfund owned numerous technology patents related to encryption technology (see also Lee Declaration at ¶ 15; Bogeaus Declaration at ¶ 47 citing Arbitration Trial Transcript 3/26; 289:20-290-12);
- (3) Debtor and Emailfund had a research center at Stanford University in Palo Alto, California (see also Lee Declaration at ¶ 9);
- (4) Debtor and Emailfund had obtained the highest level of wireless encryption technology in the world (see also Lee Declaration at ¶ 10);
- (5) Debtor and Emailfund were recruiting investment of \$2 million for the further development of the "security software" in return for 40% of the outstanding shares of Emailfund (See also Bogeaus Declaration at ¶ 42,E); and

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1 (6) Debtor and Emailfund had already received investment of  
2 \$150,000 from Cess Telecom, Ltd. (see also Lee  
3 Declaration, ¶ 12).

4 Dongjin alleges, at paragraph 8 of the Complaint, that Debtor  
5 and Emailfund made the following further misrepresentations to  
6 Dongjin both in Emailfund's due diligence report provided to  
7 Dongjin, and orally:

8 (1) Emailfund's researchers included Professor Phillip  
9 Rogaway, and Dr. Peter Landrock, well-known, prominent  
10 engineers in the field of encryption technology (see also  
11 Lee Declaration at ¶ 13; Bogeaus Declaration at ¶ 47  
12 citing Arbitration Trial Transcript 3/28; 928:9-19);

13 (2) Both Professor Rogaway and Dr. Landrock were and would be  
14 the core of the technology development team of Emailfund  
15 (see also Lee Declaration at ¶ 13; Bogeaus Declaration at  
16 ¶ 47 citing Arbitration Trial Transcript 3/28; 928:9-19);

17 (3) Emailfund owed a number of technology patents including  
18 four specific patents related to wireless encryption  
19 technology (see also Lee Declaration, ¶ 15, Bogeaus  
20 Declaration at ¶ 47 citing Arbitration Trial Transcript  
21 3/26; 289:20-290-12); and

22 (4) Debtor stated that the investment in Emailfund would be  
23 very profitable investment in light of Professor Rogaway  
24 and Dr. Landrock being members of Emailfund's technology  
25 development team and Emailfund's key patents (Lee  
26 Declaration at ¶ 14).

27 Complaint at ¶ 8.  
28

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1  
2       **B.     The Arbitration and Bankruptcy Filings**

3           On March 1, 2002, Dongjin initiated an action against  
4 Emailfund in the Orange County Superior Court seeking rescission of  
5 the Agreement and damages for breach of fiduciary duty by Debtor.  
6 Declaration of Paul Arrow in Support of Application for Entry of  
7 Default Judgment Against Defendant Sangmun Kim (the "Arrow  
8 Declaration") at ¶ 3; Lee Declaration at 28. This case went to AAA  
9 international arbitration, in light of the binding arbitration  
10 provision in the investment agreement (the "Arbitration"). Arrow  
11 Declaration at ¶3, Bogeaus Declaration at ¶ 14. By order dated  
12 December 6, 2004, Debtor became a party defendant to the  
13 Arbitration. Bogeaus Declaration at ¶ 16. Trial in the  
14 Arbitration was scheduled to commence on April 17, 2006. Arrow  
15 Declaration at ¶ 5.

16           On April 14, 2006, both Debtor and Emailfund filed bankruptcy  
17 petitions in the Central District of California. Id. "Venue was  
18 alleged to exist there based on the location of a manuscript  
19 allegedly written by the debtor in a bikini shop [owned by Debtor's  
20 acquaintance] in Malibu, California." Complaint at 2:28-3:2; see  
21 also Arrow Declaration at ¶ 7.

22           In his bankruptcy petition, Debtor's residence was listed as  
23 being in Seoul, South Korea. Arrow Declaration at ¶ 5. His  
24 occupation was listed as a mathematics professor at Yonsei  
25 University in Seoul, South Korea. Id. Debtor's Schedules showed  
26 he had real property valued at \$400,000, secured claims of  
27 \$400,000, personal property of \$1,840,595 and general unsecured  
28

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1 debts of \$1,313,549.18. Arrow Declaration at ¶ 6. On  
2 June 12, 2006, Debtor's bankruptcy case was dismissed as a bad  
3 faith filing and the court imposed a 180 day bar to refiling.  
4 Arrow Declaration at ¶ 7.

5 On August 17, 2006, relief from stay was granted in the  
6 Emailfund case to allow Dongjin to proceed with the Arbitration.  
7 Arrow Declaration at ¶ 8.

8 Just a few days after the expiration of the 180-day bar, on  
9 March 10, 2007, Debtor filed another bankruptcy case, this time in  
10 the District of Massachusetts. Arrow Declaration at ¶ 10. Debtor  
11 alleged venue in that district based on residence, domicile, place  
12 of business or principal assets. Id. Dongjin determined on its  
13 own that an individual named "Soon B. Kim" allegedly lived at the  
14 Belmont, Massachusetts address given by Debtor in his petition.  
15 Id. Debtor admitted in a declaration submitted in the Arbitration,  
16 that he was working as a professor in South Korea at the time this  
17 second bankruptcy petition was filed. Id. In this second  
18 bankruptcy filing, Debtor's Schedules showed he had no real  
19 property assets, personal property valued at \$207,050 and unsecured  
20 priority debts of \$3,500 (plus a \$800,000 debt to Dongjin owed  
21 jointly by Debtor and Emailfund). Id. at ¶ 11.

22 Dongjin obtained relief from stay in this second bankruptcy  
23 and was allowed to proceed with the Arbitration. Arrow Declaration  
24 at ¶ 12. The Arbitration was completed between March 26 and March  
25 29, 2007. Id. at 13. On July 9, 2007, the arbitrator issued the  
26 Arbitration Award in Dongjin's favor in the total amount of  
27 \$944,696.46. Id. The basis for the Arbitration Award was  
28

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1 Dongjin's claim for rescission of the contract due to failure of  
2 consideration. Id. Specifically, the Arbitration Award found:

3 Emailfund is at fault for failing to make a good faith  
4 effort to develop the product, and that this  
5 nonperformance is sufficiently material to go to the  
6 essence of the agreement such that there was a failure of  
7 consideration that entitles Dongjin to rescission.

8 and

9 [T]he alter ego doctrine is to be applied such that Kim  
10 shall be jointly and severally liable with Emailfund to  
11 Dongjin for the \$800,000 compensatory damages awarded  
12 against Emailfund on Dongjin's cause of action for  
13 rescission based on failure of consideration.

14 Arbitration Award at 4-5. The Arbitration Award did not reach  
15 Dongjin's allegations of fraud against Debtor and Emailfund,  
16 finding:

17 Because the arbitrator has awarded Dongjin \$800,000 in  
18 rescission damages based on failure of consideration, the  
19 arbitrator need not, and does not decide whether Dongjin  
20 is entitled to rescission damages based on fraud, or to  
21 any other damages based on fraud. This is because even  
22 were the arbitrator to determine that there was fraud,  
23 Dongjin could not, pursuant to any of its fraud claims,  
24 recover damages greater than the \$800,000 the arbitrator  
25 has awarded Dongjin. (Dongjin does not assert that it is  
26 entitled to greater than \$800,000 in compensatory damages  
27 on either of its fraud claims.) Further, any award to  
28 Dongjin on either claim for fraud would be duplicative  
of, and overlap, the \$800,000 awarded.

Arbitration Award at 4. Although Dongjin had sought punitive  
damages, the Arbitration Award indicates that such damages were not  
available under AAA Rules. Id.

**C. Proceedings before this Court**

Shortly after the Arbitration Award was rendered, on  
August 22, 2007, Debtor filed a motion to transfer his bankruptcy  
case to the Northern District of California, on the basis that he

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1 now resided there. Arrow Declaration at ¶ 17. The order granting  
2 this motion was entered on September 14, 2007. Id.

3 On October 22, 2007, Debtor filed a notice of voluntary  
4 conversion to Chapter 7. Id. The Chapter 7 Trustee was appointed  
5 on October 24, 2007.

6 On October 29, 2007, Debtor filed a notice of change of  
7 address. Arrow Declaration at ¶ 18. According to the notice,  
8 signed by debtor, his address was "Building 90, MC: 2155, Stanford  
9 Quad, Stanford, CA 94305-2155." Id. Dongjin is informed and  
10 believes this is actually a building housing the Philosophy  
11 Department of Stanford University. Id.

12 This Adversary Proceeding was filed on January 31, 2008. On  
13 February 7, 2008, one day after the service of the summons in this  
14 Adversary Proceeding, Debtor filed a second notice of change of  
15 address with the Court, which simply states as follows:

16 I hereby file a notice that as of this twenty-sixth day  
17 of January 2008 I will not be any longer at the former  
18 address Building 90, Stanford Quad, Stanford, CA 94305-  
2155. As soon as I have a new address, I will notify you  
of it.

19 On February 29, 2008, Debtor filed a motion to dismiss his  
20 Chapter 7 case (the "Motion to Dismiss"). In the Motion to  
21 Dismiss, Debtor disputed the arbitrator's authority and  
22 jurisdiction over him personally in the underlying Arbitration with  
23 Dongjin. Debtor argued that the parties never agreed to allow the  
24 arbitrator to determine arbitrability. Debtor argued the  
25 arbitrator exceeded his authority and, therefore, the Court should  
26 refuse to enforce the Arbitration Award against him. The Motion to  
27 Dismiss further states:

28  
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Debtor will seek a judicial declaration from the California State Court that Debtor is not validly a party to the Arbitration and rulings of the arbitrator to the contrary and any proceedings taken against Debtor are void and of no force or effect, if Creditor seeks to confirm the arbitral award against Debtor in the California state court.

Motion to Dismiss at ¶ 8. Debtor argued that his bankruptcy case is primarily a two-party dispute between himself and Dongjin. Id. at ¶ 11. As such, per Debtor, no parties would be harmed by dismissing this bankruptcy case.

To this Motion to Dismiss, Debtor attached (1) various letters he sent to the arbitrator objecting to jurisdiction over him personally<sup>3</sup> and (2) a copy of a California identification card issued on October 3, 2007, which includes the same address at Stanford University. Debtor said in his Motion to Dismiss that he was conducting research at Stanford, but no longer works there. Motion to Dismiss at ¶ 16.

On March 7, 2008, the Court indicated it would not sign the proposed order on the basis that the Court cannot grant the Motion to Dismiss without a noticed hearing as required by Federal Rule of Bankruptcy Procedure 1017.<sup>4</sup> Despite instructions from the Court to set this matter for hearing, Debtor has never done so.

Debtor has not filed a response in this Adversary Proceeding. On April 11, 2008, the Clerk of the Bankruptcy Court entered a

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<sup>3</sup> The Arbitration Award notes that "by Order dated December 6, 2004, the Arbitrator determined that Dr. Sangmun Kim, as an individual, is a party to this arbitration as a respondent. As set forth in that Order, Kim contended at that time that he had entered into a written agreement to arbitrate, and that he was a party to this arbitration." Arrow Declaration, Exhibit A at 2-3.

<sup>4</sup> See docket entry 101 in Chapter 7 case.

1 default against Debtor.

2 On May 12, 2008, the Court held a case management conference  
3 in this Adversary Proceeding. The docket entry for this hearing  
4 indicates the Court instructed Dongjin as follows: "Plaintiff is  
5 instructed not to request a Default Judgment for 30 days to see if  
6 Defendant files a new address, if new address isn't filed then  
7 Plaintiff should serve Defendant at old address." On July 3, 2008,  
8 Dongjin filed its Application for entry of default judgment against  
9 Debtor. On July 29, 2008, Dongjin served the Application and its  
10 supporting declarations on Debtor at the Stanford University  
11 address. A review of the dockets for this Adversary Proceeding and  
12 Debtor's main Chapter 7 case confirms that no notice of a new  
13 address has been filed by Debtor.

14  
15 **II.**

16 **ANALYSIS**

17 The proposed default judgment seeks relief under several  
18 different code sections in an "and/or" alternative ruling.  
19 Therefore, each code section cited must be considered separately.

20  
21 **A. 523(a)(2)**

22 Section 523(a)(2) provides, in pertinent part, as  
23 follows:

24 (a) A discharge under section 727...of this  
25 title does not discharge an individual debtor  
from any debt--

26 . . .

27 (2) for money, property, services, or an  
28 extension, renewal, or refinancing of credit,

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1 to the extent obtained by--

2 (A) false pretenses, a false  
3 representation, or actual fraud,  
4 other than a statement  
5 respecting the debtor's or an  
6 insider's financial condition;

7 (B) use of a statement in writing--

8 (I) that is materially false;

9 (ii) respecting the debtor's or an  
10 insider's financial condition;

11 (iii) on which the creditor to whom  
12 the debtor is liable for such money,  
13 property, services, or credit  
14 reasonably relied; and

15 (iv) that the debtor caused to  
16 be made or published with intent  
17 to deceive

18 A creditor must prove the elements of nondischargeability under  
19 § 523(a) by a preponderance-of-the-evidence standard. Grogan v.  
20 Garner, 498 U.S. 279, 286 (1991).  
21

22 **1. 523(a)(2)(A)**

23 To except a debt from discharge under Bankruptcy Code  
24 § 523(a)(2)(A), the creditor must show: (1) the debtor made  
25 representations to the creditor; (2) the debtor knew the  
26 representations were false at the time they were made; (3) the  
27 debtor made the representations with the intention and purpose of  
28 deceiving the creditor (aka scienter); (4) the creditor justifiably  
relied on the representations; and (5) the creditor sustained the  
alleged loss and damage as the proximate result of the  
representations having been made. In re Eashai, 87 F.3d 1082, 1086  
(9th Cir. 1996).

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As noted above, the Arbitration Award expressly declined to address Dongjin's allegations of fraud by Debtor.<sup>5</sup> However, the evidence provided in the Lee and Bogeaus Declarations, as described above, do tend to support each of these elements. Therefore, default judgment can be entered against the debtor under 523(a)(2)(a).

**2. 523(a)(2)(B)**

To except a debt from discharge under 523(a)(2)(B), the creditor must show: (1) it provided the debtor with money,

---

<sup>5</sup> To the extent that the Arbitration Award does address a particular issue, it is entitled to res judicata and collateral estoppel effect as to the parties to the arbitration. 6 Witkin, California Procedure (5<sup>th</sup> ed. 2008) Proceedings Without Trial § 562, citing State Farm Mut. Auto Ins. Co. V. Superior Court, 211 C.A.3d 5, 14, 259 C.R. 50 (1989) (collateral estoppel effect as to issues "actually, necessarily, and finally" resolved in arbitration); Thibedeau v. Crum, 4 C.A.4th 749, 755, 6 C.R.2d 27, 7 Cal. Proc. (5<sup>th</sup>), Judgment, §362 (1992) (res judicata doctrine applies to arbitration award, even though unconfirmed, barring subsequent assertion of claims within scope of arbitration); Shell, Richard, Res Judicata and Collateral Estoppel Effects of Commercial Arbitration, 35 U.C.L.A. L. Rev. 623 (res judicata and collateral estoppel effect).

As discussed at pages 9-10 infra, Debtor has suggested in other pleadings that he was not properly a party to the Arbitration. Debtor even suggested he would seek relief from the California State courts when and if Dongjin seeks to confirm the Arbitration Award and enforce it against Debtor. Motion to Dismiss at ¶ 8. However, the time period within which Debtor may have moved to vacate the Arbitration Award against him has long since passed. California Code of Civil Procedure § 1288 provides that "a petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner." The Arbitration Award is dated July 9, 2007. If the party who lost in the arbitration does not serve and file a petition to vacate within the 100-day period from the date of service of the award, the award must be treated as final. Eternity Investments, Inc. v. Brown, 60 Cal.Rptr.3d 134, 151 Cal.App.4th 739 (Cal.App. 2 Dist. 2007).

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1 property, services or credit based on a written representation of  
2 fact by the debtor as to debtor's financial condition; (2) the  
3 representation was materially false; (3) the debtor made the  
4 representation with the intention of deceiving the creditor; (4)  
5 the creditor relied on the representation; (5) the creditor's  
6 reliance was reasonable; and (6) damage proximately resulted from  
7 the representation. In re Siriani, 967 F.2d 302, 304 (9<sup>th</sup> Cir.  
8 1992); In re Candyland, 90 F.3d 1466, 1469 (9<sup>th</sup> Cir. 1996).

9 Again, although not addressed by the Arbitration Award, the  
10 Lee and Bogeaus Declarations do tend to support each of these  
11 elements. Therefore, a default judgment can be entered against  
12 Debtor under 523(a)(2)(B).

13  
14 **B. 523(a)(6)**

15 Section 523(a)(6) provides:

16 (a) A discharge under section 727...of this  
17 title does not discharge an individual debtor  
18 from any debt--

19 . . .

20 (6) for willful and malicious injury by the  
21 debtor to another entity or to the property of  
22 another entity.

23 A simple breach of contract is not the type of injury intended  
24 to be covered by § 523(a)(6). In re Jercich, 238 F.3d 1202, 1205  
25 (9<sup>th</sup> Cir. 2001); In re Riso, 978 F.2d 1151, 1154 (9<sup>th</sup> Cir. 1992).  
26 Even an intentional breach of contract generally will not lead to  
27 nondischargeability under § 523(a)(6) unless accompanied by  
28 malicious and willful tortious conduct. Jercich, 238 F.3d at 1205;  
Riso, 978 F.2d at 1154. The Arbitration Award obtained by Dongjin

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1 was on the basis of rescission of the contract for failure of  
2 consideration. This does not appear to be the type of "willful and  
3 malicious" conduct contemplated by 523(a)(6), and Dongjin has not  
4 presented sufficient evidence to support such a finding.  
5 Therefore, a default judgment should not be entered against the  
6 debtor under 523(a)(6).

7  
8 **C. 727(a)(2)**

9 Section 727(a)(2) provides:

10 (a) The court shall grant the debtor a  
11 discharge, unless--

12 . . .

13 (2) the debtor, with intent to hinder,  
14 delay, or defraud a creditor or an officer  
15 of the estate charged with custody of  
property under this title, has  
transferred, removed, destroyed,  
mutilated, or concealed--

16 (A) property of the debtor, within  
17 one year before the date of the  
filing of the petition; or

18 (B) property of the estate, after the  
19 date of the filing of the petition

20 In this case, evidence has been submitted that Debtor diverted  
21 \$742,000 belonging to EmailFund to BZ21, another corporation wholly  
22 owned and controlled by Debtor, to himself and to an unknown  
23 entity. Arbitration Award at 5. These transfers appear to have  
24 occurred in 2001. Bogeaus Declaration at ¶ 34. To the extent that  
25 the corporate veil has been pierced by the Arbitration Award, then  
26 this would be a diversion of Debtor's property. However, these  
27 transfers appear to have occurred roughly 6 years prior to the  
28 filing of Debtor's current bankruptcy case. Since these transfers

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1 were not made within one year of the bankruptcy filing, Bankruptcy  
2 Code § 727(a)(2) is not applicable. There is no other evidence  
3 currently before the Court regarding transfers by Debtor just prior  
4 to his bankruptcy filing. Therefore, default judgment cannot be  
5 rendered in Dongjin's favor under 727(a)(2).

6  
7 **D. 727(a)(3)**

8 Section 727(a)(3) provides:

9 (a) The court shall grant the debtor a  
10 discharge unless-

11 . . .

12 (3) the debtor concealed, destroyed,  
13 mutilated, falsified, or failed to keep or  
14 preserve any recorded information,  
15 including books, documents, records, and  
16 papers, from which the debtor's financial  
condition or business transactions might  
be ascertained, unless such act or failure  
to act was justified under all of the  
circumstances of the case

17 Under 727(a)(3), the debtor's actions are analyzed under an  
18 objective standard. "[I]f the extent and nature of the debtor's  
19 transactions were such that others in like circumstances would  
20 ordinarily keep financial records, she must show more than that she  
21 did not comprehend the need for them." In re Cox, 41 F.3d 1294,  
22 1297 (9th Cir 1994). The mere failure to keep whatever books and  
23 records are objectively typical under the circumstances is enough  
24 to trigger the statute. It is not necessary that the failure have  
25 been based on a wrongful desire to conceal information or harm  
26 creditors. Id.

27  
28  
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1 Evidence has been submitted by Dongjin that Debtor failed to  
2 maintain the business records of Emailfund. The arbitrator  
3 specifically noted:

4 Emailfund's failure to observe corporate formalities and  
5 maintain proper books and records. This includes  
6 incomplete, inadequate ledgers, journals and other  
7 accounting records, and falsified signatures on minutes  
of what were claimed to be meetings of Emailfund's board  
of directors.

8 Arbitration Award at 5. Per the Arbitration Award, there were no  
9 payroll records and no employment contracts for Debtor or any other  
10 officer of Emailfund. This evidence does support a denial of  
11 discharge under 727(a)(3).

12  
13 **E. 727(a)(4)**

14 Section 727(a)(4) provides:

15 (a) The court shall grant the debtor a  
16 discharge unless--

17 . . .

18 (4) the debtor knowingly and fraudulently, in  
19 or in connection with the case--

20 (A) made a false oath or account;

21 (B) presented or used a false claim;

22 (C) gave, effected, received, or  
23 attempted to obtain money, property, or  
24 advantage, or a promise of money,  
property, or advantage, for acting or  
forbearing to act; or

25 (D) withheld from an officer of the  
26 estate entitled to possession under this  
27 title, any recorded information, including  
28 books, documents, records, and papers,  
relating to the debtor's property or  
financial affairs

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1 Per Bankruptcy Rule 4005, plaintiff bears the burden of  
2 proving by a preponderance of the evidence that false oaths were  
3 "knowingly and fraudulently" made, in or in connection with the  
4 bankruptcy case. The mere making of a false oath in or in  
5 connection with the bankruptcy case is not enough to deny discharge  
6 under §727(a)(4). The false oath must have been made "knowingly  
7 and fraudulently". In re Adeeb, 787 F.2d 1339 (9th Cir. 1986); In  
8 re Devers, 759 F.2d 751 (9th Cir. 1985). Actual, and not merely  
9 constructive, intent to defraud must be shown. In re Woodfield,  
10 978 F.2d 516 (9th Cir. 1992). Such actual intent may be inferred  
11 from the surrounding circumstances. Id. Thus, the nature of each  
12 false oath made in or in connection with the case must be examined  
13 in the context of the bankruptcy case to determine whether it  
14 supports an inference that it was made "knowingly and  
15 fraudulently", i.e., with the intent to defraud the court, the  
16 trustee, or creditors.

18 The false statements that Dongjin has alleged Debtor has made  
19 relating to this bankruptcy case are: (1) his address and (2) his  
20 Schedules, which were vastly different from those filed in his  
21 prior bankruptcy case roughly one year prior. With respect to the  
22 issue of his address, Debtor has submitted a copy of a California  
23 identification card with the same address as that used to establish  
24 venue before this Court. With respect to the Schedules, a \$400,000  
25 real estate property in Korea was eliminated along with its  
26  
27  
28

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1 corresponding \$400,000 disputed secured debt owed to Dongjin. More  
2 troubling, however, is the reduction of value of Debtor's personal  
3 property from \$1,840,595 to \$207,050.<sup>6</sup> Unsecured debts also shrank  
4 from \$1,313,549.18 to \$803,500 (including the \$800,000 award to  
5 Dongjin which was valued at \$800,000 in Debtor's 2006 Schedules but  
6 is listed as an "unknown" amount in Debtor's 2007 Schedules).<sup>7</sup>  
7 However, there was a one-year gap between the filing of the two  
8 sets of schedules. Many things could have happened. Therefore, on  
9 the scant evidence currently before the Court, a default judgment  
10 under 727(a)(4) is not supported.  
11

12  
13 **F. 727(a)(5)**

14 Section 727(a)(5) provides:

15 (a) The court shall grant the debtor a  
16 discharge unless--  
17 . . .

18  
19 <sup>6</sup> The bulk of this change in value of Debtor's personal  
20 property is attributable to the devaluation by Debtor of stock  
21 holdings in corporations formed by Debtor. In his 2006 Schedules,  
22 Debtor valued his 2.9 million shares of Emailfund at \$510,000. In  
23 his 2007 Schedules, these same shares were valued at \$0. In his  
24 2006 Schedule B, Debtor also listed 8.2 million shares in MobileBZ  
25 (82% ownership) valued at \$700,000. The MobileBZ shares are not  
26 listed in his 2007 Schedule B, which is dated 1 year and one day  
27 after his 2006 Schedules. Likewise missing from his 2007 Schedule  
28 B is a \$50,000 pension from Yonsei University. Debtor lists the  
intellectual property of a "mathematics manuscript" in both sets of  
Schedules, but the value decreases from \$574,000 in his 2006  
Schedule B to \$200,000 in his 2007 Schedule B.

<sup>7</sup> The most significant change in Debtor's unsecured claims  
was the elimination of a \$400,000 personal loan by Hwang Kyu of  
Chunan, Korea was listed in Debtor's 2006 Schedule F, but not  
listed in Debtor's 2007 Schedule F.

MEMORANDUM DECISION

1 (5) the debtor has failed to explain  
2 satisfactorily, before determination of denial  
3 of discharge under this paragraph, any loss of  
4 assets or deficiency of assets to meet the  
5 debtor's liabilities

6 Section 727(a)(5) denies a discharge to a debtor who has  
7 failed to explain satisfactorily any loss or deficiency of assets.  
8 Whether an explanation is satisfactory must necessarily be  
9 determined on a case by case basis. See In re Devers, 759 F.2d 751  
10 (9th Cir 1985).

11 There has been no discussion of any kind about a loss of  
12 assets by Debtor at this point. Dongjin has its suspicions, but  
13 there is currently no evidence before the Court on this issue.  
14 Therefore, on the evidence currently before the Court, default  
15 judgment under 727(a)(5) is not appropriate.

16  
17 **III.**

18 **CONCLUSION**

19 For the above stated reasons, the Application is granted. The  
20 Court shall enter a Default Judgment against Debtor, but only under  
21 the provisions of Bankruptcy Code §§ 523(a)(2) and 727(a)(3).  
22 The evidence currently before the Court does not support the entry  
23 of a default judgment under the remaining alternative bases  
24

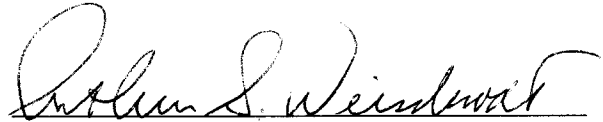
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MEMORANDUM DECISION

1 asserted by Dongjin, namely Bankruptcy Code §§ 523(a)(3),  
2 523(a)(4), 523(a)(5), 727 (a)(2), 727 (a)(4) and 727(a)(5).  
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4 Dated: 12/22/08  
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8 ARTHUR S. WEISSBRODT  
9 UNITED STATES BANKRUPTCY JUDGE  
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MEMORANDUM DECISION

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MEMORANDUM DECISION